AmBank (M) Bhd v New Century Concepts Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — SUIT NO Q-22NCC-2009 OF 2010
HAMID SULTAN J
22 APRIL 2011

Civil Procedure — Pleadings — Defence — Application to amend defence to include counterclaim at execution of judgment stage — Whether court had discretion to allow application — Whether application should be allowed — Rules of the High Court 1980 O 15 r 2

After the plaintiff had obtained summary judgment against the defendants and while it was in the process of executing the judgment, the defendants filed the present application to amend their defence to include a counterclaim. The plaintiff objected to this application on the grounds that the present suit was no longer extant. The plaintiff further submitted that the defendants' proposed cause of action in the counterclaim was fundamentally different from the plaintiff's claim. The defendants contended that the court had the discretion to entertain the present application based on the justice of the case.

Held, dismissing the defendants' application with no order as to costs:

(1) As a general rule the court should not entertain the defendants' application to amend their defence to include a counterclaim, when the main suit had been disposed of and the defence had failed, except in rare circumstances. Order 15 r 2 of the Rules of the High Court 1980, which the defendants relied on, would not be of any assistance to the defendants if the plaintiff's action had been disposed of. As such, the defendants' application to amend a sterile defence to include a counterclaim had to be dismissed (see para 6).

(2) Further, the court in considering such an application ought to bear in mind the jurisprudence relating to finality in litigation (see para 6(d)).

(3) In the absence of any appeal against the judgment, the action had come to an end and the court was now functus officio. Thus, any further action by the defendants ought to be brought via a new suit (see para 6(e)).

[Bahasa Malaysia summary

Selepas plaintif memperolehi penghakiman terus terhadap defendan-defendan dan semasa ia dalam proses melaksanakan penghakiman, defendan-defendan memfailkan permohonan ini untuk meminda pembelaan mereka untuk memasukkan tuntutan balas. Plaintif membantah permohonan ini atas alasan

bahawa tindakan ini tidak lagi wujud. Plaintif selanjutnya berhujah bahawa kausa tindakan yang dicadangkan oleh defendan-defendan dalam tuntutan balas adalah pada dasarnya berlainan daripada tuntutan plaintif. Defendan-defendan berhujah bahawa mahkamah mempunyai budi bicara untuk mendengar permohonan ini berdasarkan keadilan kes ini.

Diputuskan, menolak permohonan defendan-defendan tanpa perintah kepada kos:

(1) Sebagai kaedah am mahkamah tidak sepatutnya mendengar permohonan defendan-defendan untuk meminda pembelaan mereka untuk memasukkan tuntutan balas, apabila tindakan utama telah didengar dan pembelaan telah gagal, kecuali keadaan-keadaan luar biasa. Aturan 15 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980, yang digunakan oleh defendan-defendan, tidak akan memberikan apa-apa bantuan kepada defendan-defendan jika tindakan plaintif telah didengar. Oleh itu, permohonan defendan-defendan untuk meminda pembelaan kosong untuk memasukkan tuntutan balas patut ditolak (lihat perenggan 6).

(2) Selanjutnya, mahkamah dalam mempertimbangkan permohonan sedemikian patut mengambilkira jurisprudens berkaitan kepada kemudtamadan dalam litigasi (lihat perenggan 6(d)).

(3) Dalam ketiadaan apa-apa rayuan terhadap penghakiman, tindakan tersebut sampai kepada penghujungnya dan mahkamah adalah sekarangnya *functus officio*. Oleh itu, apa-apa tindakan lanjut oleh defendan-defendan patut dibangkitkan melalui tindakan baru (lihat perenggan 6(e)).]

Notes

For cases on defence, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5943–5981.

Cases referred to

CSI International Co Ltd v Archway Personnel (Middle East) Ltd [1980] 3 All ER 215, CA (refd)

Everise Hectares Sdn Bhd v Citibank Bhd [2011] 2 CLJ 25, CA (refd)

Salybia, The [1910] P 25 (refd)

Legislation referred to

Rules of the High Court 1980 O 15 r 2(1)

FY Choong (Shook Lin & Bok) for the plaintiff.
Bhavanash Sharma (Gill & Tang) for the defendants.

Hamid Sultan J:

[1] This is my judgment in respect of the defendants' application ('encl 19') to amend the defence to include a counterclaim when the plaintiff has already obtained a summary judgment and is in the process of executing the judgment.

[2] The central issue in this case is whether or not the defendants are permitted to include a counterclaim when the main suit has been duly disposed off and a judgment has been given by the court pursuant to rules of the court.

BRIEF FACTS

[3] In the instant case the plaintiff has already obtained summary judgment and in the process of enforcing the judgment by way of garnishee and bankruptcy proceedings. In an unusual manner the defendants have made this application to include a counterclaim. The plaintiff objects vehemently on the following grounds, namely: (i) the present suit is no longer extant; (ii) the defendants' proposed cause of action in the counterclaim is fundamentally different from the plaintiffs' claim; and (iii) in any event, the court may order the counterclaim (if allowed) to be struck out or tried separately.

[4] Learned counsel for the defendants in reliance of the English case of *CSI International Co Ltd v Archway Personnel (Middle East) Ltd* [1980] 3 All ER 215 says the court has the discretion and in that case the court has stated that the power of 'making' a counterclaim is found in the Supreme Court of Judicature (Consolidation) Act 1925. The relevant s 39 reads as follows:

> The court of judge shall have the power to grant to any defendant in respect of any equitable estate or right of or other matter or equity, right or title claimed or asserted by him — (a) all such relief against any plaintiff or petitioner as the defendant has properly claimed by his pleading and as the court or judge might have granted in any suit instituted for that purpose by that defendant against the same plaintiff or petitioner; and (b) such relief relating to or *connected with the original subject of the cause or matter*, claimed in like manner against any other person …

In that case His Lordship Raskill LJ made the following observations:

> I am bound to say that, for the reasons the deputy judge gave, I do not think there is anything to stop a defendant serving a counterclaim (and I use the word 'serve' as a neutral word but perhaps I should have said 'making' a counterclaim) where there is a judgment against him which has not been stayed provided that the counterclaim falls within the general purview of s 39 of the 1925 Act and other relevant rules to which I have referred.

[5] Parties have relied on the following cases: *CSI International Co Ltd v Archway Personnel (Middle East) Ltd* [1980] 3 ALL ER 215; *The Salybia* [1910] P 25;*Everise Hectares Sdn Bhd v Citibank Bhd* [2011] 2 CLJ 25.

[6] I have read the application, affidavits and submissions of the parties in detail. I take the view that the defendants' application to amend a sterile defence to include a counterclaim must be dismissed. My reasons, inter alia, are as follows:

(a) The rules of the court do not strictly permit an amendment to include a counterclaim when the main suit has been disposed off. Order 15 r 2(1) which the defendants purportedly relies on limits a counterclaim to bring in the plaintiff's action. If the plaintiffs action has been disposed off I do not think O 15 r 2(1) will be of assistance to the defendants. The Order 15 r 2(1) reads as follows:

> Subject to rule 5(2), a defendant in any action who alleges that he has any claim or is entitled to any relief or remedy against a plaintiff in the action in respect of any matter (whenever and however arising) may, instead of bringing a separate action, make a counterclaim in respect of that matter; and where he does so he must add the counterclaim to his defence.

(b) The English case of *CSI International* relates to the peculiar facts of the case as well as the jurisdiction and power of the court to entertain such an application according to the justice of the case. The facts of the instant case do not warrant the court to entertain the defendants' application.

(c) I am inclined to say as a general rule the court ought not entertain the amendment to include a counterclaim when the main suit has been disposed off and the defence has failed, unless it is a case where the plaintiff is a foreign plaintiff and it will be more convenient to deal with the counterclaim in the exercise of the court's inherent jurisdiction failing which the defendants may not have a remedy at all or cases of that nature which must be extremely rare. Support for my proposition can be gleaned from many cases inclusive of *CSI International*. In *The Salybia* [1910] P 25, where the defendants therein gave notice of its intention to commence a counterclaim against the plaintiff after the plaintiff informed the defendants that it is no longer proceeding with this action, Sir John Bingham (as he then was) was of the view that:

> I am of the opinion that no counterclaim was ever set up. *A counterclaim can only be born of a living action.* The letter of November 4 was written after the action had been wholly discontinued and when 'the case' had gone. If *Bildt v Foy* (1) be good law, I think it is distinguishable on the ground that there the counterclaim was mentioned while the action was still alive, whereas here it was not mentioned until after the action was dead. I doubt, moreover, whether a mere casual reference to an intention to prefer a

counter claim can be described as setting up a counter claim at all. I think the registrar was right in refusing the applicaiton.

(d) It must also be noted that the court in considering such an application must keep in mind the jurisprudence relating to finality to litigation. In *Everise Hectares Sdn Bhd v Citibank Bhd.* [2011] 2 CLJ 25 the court dismissed the said application and held that:

> The filing of the amendment application was a tactical manoeuvre on the appellant's part to delay and prevent the respondent from completing the sale of the said land to Fenomena Kualiti. The appellant should have appealed against the dismissal of the first injunction application and applied for an Erinford injunction pending the appeal to the Court of Appeal. Instead the appellant filed the amendment application some months after the dismissal of the injunction application. Tactical manoeuvrings were frowned by the courts.

(e) I agree with the plaintiff's submission that in this matter in the absence of any appeal against the judgment, the action has come to an end and the court is now *functus officio*. Any further action by the defendants ought to be brought via a new suit.

[7] For reasons stated above the defendants' application encl 19 is dismissed with no order as to costs.

[8] I hereby order so.

Defendants' application dismissed with no order as to costs.

Reported by Kohila Nesan